No. 98-238

In the Supreme Court of the United States

OCTOBER TERM, 1998

TOGO D. WEST, JR., SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, PETITIONER

v.

MICHAEL GIBSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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A. Congress has authorized the EEOC to award compensatory damages as an "appropriate remed[y]" for employment discrimination by federal agencies

Two statutory provisions, read together, evince Congress's intent that the Equal Employment Opportunity Commission (EEOC) be able to award compensatory damages against the federal government for employment discrimination in violation of Title VII. The earlier enacted provision, 42 U.S.C. 2000e-16(b), grants the EEOC the "authority to enforce * * * through appropriate remedies" Congress's directive, in 42 U.S.C. 2000e-16(a) (Supp. II 1996), that "[a]ll personnel actions" of the federal government "shall be made free

from any discrimination based on race, color, religion, sex, or national origin." It also grants the EEOC the authority to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate" to carry out that directive. The more recently enacted provision, 42 U.S.C. 1981a(a)(1), authorizes the award of compensatory damages in "action[s]" against the federal government for employment discrimination in violation of Section 2000e-16.

It makes no difference whether either provision, read in isolation, would confer such authority on the EEOC.[1] Statutory provisions "must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Congress did not specify in Section 2000e-16(b) the universe of "remedies" that are "appropriate" for the EEOC to award in the administrative process. Congress must therefore have contemplated that the EEOC and the courts would look to the "overall statutory scheme" of which Section 2000e-16(b) is a part in order to give content to the term "appropriate remedies." Cf. *Ruckelshaus* v. *Sierra Club*, 463 U.S.

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[1] Respondent thus errs in asserting (Br. 18) that "[t]he linchpin of the Government's argument is that Congress waived sovereign immunity for the purpose of administrative awards of compensatory damages when it delegated to EEOC 'authority to enforce . . . through appropriate remedies.'" We do not argue that Congress waived the government's sovereign immunity with respect to administrative awards of compensatory damages in *1972*, when Congress adopted the provision authorizing the Civil Service Commission, and subsequently the EEOC, to award "appropriate remedies" for violations of Title VII by federal agencies. We instead contend that Congress waived such sovereign immunity in *1991*, when Congress authorized awards of compensatory damages against federal agencies for violations of Title VII.

680, 683 (1983) (explaining that construing a statute authorizing attorneys' fees awards where "appropriate," a term that was not further defined in the statute, "requires reference to other sources"). Congress must also have recognized that the scope of "appropriate remedies" would not necessarily remain fixed over time, but could change as the remedies available against the federal government in the "overall statutory scheme" expanded or contracted. Accordingly, once Congress made compensatory damages available in the Civil Rights Act of 1991 as a remedy against federal agencies (and other employers) for violations of Title VII, Congress must have understood that it was likewise expanding the universe of "appropriate remedies" that the EEOC could award against federal agencies in the administrative process.

1. Respondent asserts (Br. 11) that Section 2000e-16(b) "plainly and unambiguously provides for equitable remedies only" in the administrative process. But nothing in the text of Section 2000e-16(b) purports to restrict the "appropriate remedies" that the EEOC may award to "equitable remedies only." Congress has demonstrated elsewhere in Title VII its ability expressly to restrict available remedies to "equitable" ones. 42 U.S.C. 2000e-5(g)(1) (authorizing district courts in Title VII cases against employers other than the federal government to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * * , or any other equitable relief as the court deems appropriate").

Nor should such a restriction be inferred, as respondent suggests (Br. 9-10), from the participial phrase "including reinstatement or hiring of employees with or without back pay" in Section 2000e-16(b). That phrase

merely provides an example of the "appropriate remedies" that the EEOC may award in the administrative process. As this Court has recognized, "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941); see *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 189 (1941) (concluding that a similar provision of the National Labor Relations Act was "an illustrative application" and not a limitation of the available remedies); 2A N.J. Singer, *Sutherland Statutory Construction* § 47.07, at 152 (5th ed. 1992) ("the word 'includes' is usually a term of enlargement, and not of limitation").

Respondent also argues (Br. 10) that Section 2000e-16(b) should be read to permit the EEOC to award only equitable relief, because "[t]he authority delegated by Congress to [the EEOC] was commensurate with and explicitly tied to 'the policies of this section,' which were to eradicate discrimination and 'make whole' victims." Contrary to respondent's suggestion, however, those policies are advanced by allowing victims of employment discrimination to recover compensatory damages. Indeed, in 1991, Congress added compensatory damages to the array of remedies available against all employers, including the federal government, precisely in order to deter intentional employment discrimination and to make its victims whole. See H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 1, at 64-65 (1991) (explaining that compensatory damages "are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity" and to "provid[e] employers with additional incentives to *prevent* intentional discrimination in the workplace

before it happens"); *id.* Pt. 2, at 25 ("The limitation of relief under Title VII to equitable remedies often means that victims of intentional discrimination may not recover for the very real effects of the discrimination."). This Court has recognized that the compensatory damages provision of the 1991 Act was designed "to further Title VII's 'central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.'" *Landgraf* v. *USI Film Products*, 511 U.S. 244, 254 (1994) (quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975)).

2. Respondent next argues (Br. 12) that Section 1981a(a)(1) does not authorize awards of compensatory damages in administrative proceedings. He relies principally on Section 1981a(a)(1)'s statement that compensatory damages are to be available in an "action" under, *inter alia*, Section 2000e-16. As we explained in our opening brief (at 27-28), however, the EEOC's authority to award compensatory damages is not dependent on whether an administrative proceeding is an "action" within the meaning of Section 1981a(a)(1). Congress, by making compensatory damages available against the government in judicial proceedings under Section 1981a(a)(1), gave the EEOC the authority to award compensatory damages as an "appropriate remed[y]" in administrative proceedings under Section 2000e-16(b).[2]

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[2] Respondent implies (Br. 23) that the EEOC itself has not relied on Section 2000e-16(b) in concluding that it has the authority to award compensatory damages. Although the EEOC did not expressly rely on Section 2000e-16(b) in *Jackson* v. *United States Postal Service*, EEOC Appeal No. 01923399 (Nov. 12, 1992), its first decision on the issue, the EEOC has done so in subsequent decisions reaffirming its authority to award compensatory dam-

In any event, the term "action" in Section 1981a(a)(1) can reasonably be construed as encompassing both administrative and judicial proceedings in a Title VII case against an agency of the federal government. Cf. *Webster's Third New International Dictionary* 21 (1986) (defining "action" as "a deliberative or authorized proceeding"). Because a federal employee must exhaust administrative remedies before filing suit in district court, see 42 U.S.C. 2000e-16(c), an administrative proceeding against the employing agency is a necessary prerequisite to a judicial proceeding. The two proceedings thus may appropriately be viewed as consecutive phases of a single case or "action." If Congress had intended to allow compensatory damages against the federal government only in judicial proceedings, and not in administrative proceedings, Congress presumably would have defined the term "action" in Section 1981a so as to clarify that intent. It did not.[3]

3. As we explained in our opening brief (at 16-21), Section 2000e-16(c), which requires that a federal employee exhaust administrative remedies on any complaint under Title VII, informs the construction of Sections 2000e-16(b) and 1981a(a)(1).[4] Respondent's con-

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ages. See, *e.g.*, *Turner* v. *Babbitt*, EEOC Appeal No. 1956390, 1998 WL 223578, at *5 (Apr. 27, 1998).

[3] Respondent also purports (Br. 14) to find significance in the statement in Section 1981a(a)(1) that a compensatory damages award is to be "in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964," 42 U.S.C. 2000e-5(g). But Congress was simply drawing a distinction between types of relief, *i.e.*, compensatory damages, on the one hand, and equitable relief, including back pay, on the other. It was not purporting to restrict the types of proceedings in which certain relief could be obtained.

[4] Under Section 2000e-16(c), a federal employee must present his Title VII complaint initially to his employing agency and, if

struction of those provisions cannot easily be reconciled with Section 2000e-16(c). Respondent does not dispute that Section 2000e-16(c) requires *all* federal employees with Title VII complaints—including those whose claims for relief include compensatory damages—to exhaust administrative remedies with respect to liability and equitable relief. An employee whose Title VII complaint included a compensatory damages claim thus would, in respondent's view, have to proceed first through the administrative process; then, even if the EEOC awarded all relief within its power to grant, the employee still would have to proceed through the judicial process in order to obtain full relief. Congress could not have intended to create such a convoluted enforcement scheme, which would be unduly costly, cumbersome, and time-consuming for employees and the government alike. Congress surely intended that federal employees, after the Civil Rights Act of 1991 as before, could obtain all of the same relief in the administrative process that they could obtain in district court. See S. Rep. No. 415, 92d Cong., 1st Sess. 16 (1971) (expressing congressional intent that Section 2000e-16(b) and (c) "will enable the Commission to grant full relief to aggrieved employees").

4. Respondent attempts to frame the question here as whether Congress, in Sections 2000e-16 and 1981a, has authorized the EEOC to award compensatory damages in the administrative process with the clarity required by this Court's sovereign immunity cases. But Congress has indisputably waived the government's sovereign immunity with respect to compensatory

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dissatisfied with the agency's action on the complaint, may either appeal to the EEOC or file suit in district court. He may also file suit after an adverse decision by the EEOC on appeal.

damages awards in judicial proceedings. Such a waiver necessarily encompasses adjudicatory proceedings before the government's own administrative agency—at least where, as here, Congress has given that agency expansive authority to award "appropriate remedies" for the sorts of violations at issue. None of the cases relied on by respondent in this regard (see Br. 7-8) involves analogous circumstances. Those cases consequently are not controlling here. In any event, Sections 2000e-16(b) and 1981a(a)(1), read together, provide a sufficiently clear expression of Congress's intent to waive the government's immunity from compensatory damages awards in EEOC administrative proceedings, for the reasons stated above.

Invoking the principle that "limitations and conditions upon which the Government consents to be sued must be strictly observed," *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981), respondent seeks to characterize the jury-trial provision of Section 1981a(c)(1) as such a limitation or condition on the government's waiver of sovereign immunity with respect to compensatory damages awards under Title VII. But such a characterization finds scant support in the text or legislative history of Section 1981a(c)(1), in Congress's traditional aversion to jury trials on monetary claims against the government, or in common sense.[5]

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[5] Respondent mistakenly suggests (Br. 29) that we seek to find a waiver of sovereign immunity in mere "policy considerations." To the contrary, the waiver of sovereign immunity is expressly found in the statute: in Section 1981a, the federal government has consented to liability for compensatory damages to victims of employment discrimination. The policy and purpose of Section 2000e-16(c) are relevant not to establish the waiver, but to show why the Court should reject respondent's strained effort to limit that waiver to judicial, and not administrative, proceedings.

First, Section 1981a(c)(1) states simply that "[i]f a complaining party seeks compensatory or punitive damages under this section * * * any party may demand a trial by jury."[6] Nothing in that general statutory language indicates that Section 1981a(c)(1) was adopted with the federal government in mind. Nor does the legislative history of the Civil Rights Act of 1991 contain any suggestion that Section 1981a(c)(1) was designed for the benefit of the government specifically or employers generally. As we noted in our opening brief (at 29-31 & n.20), to the extent that Congress and the President addressed the jury trial provision at all, they described the provision as a benefit to employees, not employers.

Second, this Court has recognized that "[w]hen Congress has waived the sovereign immunity of the United States, it has almost always conditioned that waiver upon a plaintiff's relinquishing any claim to a jury trial." *Lehman*, 453 U.S. at 161; see, *e.g.*, 28 U.S.C. 2402 (Supp. III 1997) (tort claims against the United States). The Court noted that "[i]t is not difficult to appreciate Congress' reluctance to provide for jury trials against the United States," given the risk that "juries 'might tend to be overly generous because of the virtually unlimited ability of the Government to pay the verdict.'" *Lehman*, 453 U.S. at 161 n.8 (quoting H.R. Rep. No. 659, 83d Cong., 1st Sess. 3 (1953)). Congress thus has generally perceived that, from the perspective of the United States as defendant, the costs of jury

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[6] Respondent's assertion (Br. 16) that "Congress committed the assessment of compensatory damages to the jury system" is thus inaccurate even with respect to judicial proceedings alone. Congress did not require, but merely permitted, jury trials in Title VII cases involving compensatory damages claims.

trials outweigh any benefits. That perception undermines respondent's suggestion that the jury trial right provided in Section 1981a(c)(1) was intended as a condition on the government's waiver of sovereign immunity. In view of Congress's historical antipathy to jury trials on monetary claims against the government, Section 1981a(c)(1) is most sensibly read to permit either party to obtain a jury trial if a federal employee's claim for compensatory damages reaches district court, not to prevent such a claim from being resolved earlier by the EEOC or by a federal agency under rules promulgated by the EEOC.

Third, there is no cogent reason why Congress would have determined that the government's right to a jury trial in Title VII cases involving compensatory damages is so important as to outweigh the efficiencies to the government of having many such cases resolved by, or at the direction of, the EEOC without resort to the courts. Nor has any such reason been suggested by respondent. See Resp. Br. 23 (declaring that "the less said about this argument, the better"). Congress has made no similar determination in any other context, including the closely analogous context of Title VII claims by its own employees. As noted in our opening brief (at 29), Congress has not afforded itself the opportunity for a jury trial in every Title VII case involving a claim for compensatory damages; to the contrary, Congress provided in the Congressional Accountability Act of 1995 that such cases may be fully resolved in an administrative process (although, if the employee elects to pursue the case in district court, either party may demand a jury trial). See 2 U.S.C. 1405(g) (Supp. III 1997) (authorizing the Office of Compliance to "order such remedies as are appropriate pursuant to subchapter II of this chapter"); 2 U.S.C.

1311(b)(1)(B) (Supp. III 1997) (including compensatory damages among available remedies).[7] Respondent is thus left in the curious position of urging a construction of the relevant statutory provisions, ostensibly "in favor of the sovereign," *Ruckelshaus*, 463 U.S. at 685 (quoting *McMahon* v. *United States*, 342 U.S. 25, 27 (1951)), that is, in fact, contrary to the sovereign's interests in the efficient resolution of Title VII complaints by its employees.

Finally, respondent's position requires the Court to ignore what plainly *is* a limitation or condition that Congress imposed on the government's waiver of sovereign immunity under Title VII: the requirement in Section 2000e-16(c) that an employee exhaust administrative remedies before proceeding to district court on a Title VII complaint. Nothing in the comprehensive language of Section 2000e-16(c) suggests that compensatory damages claims are exempt from that requirement.

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[7] Respondent asserts (Br. 25) that the Congressional Accountability Act demonstrates that, when Congress intends to make compensatory damages available in the administrative process, Congress does so more clearly than it did in Sections 2000e-16(b) and 1981a(a)(1). As we explained in our opening brief (at 24 n.18), however, there is another, more logical explanation for any differences in the provisions authorizing compensatory damages for executive branch employees and congressional employees. Congress engrafted the compensatory damages remedy for executive branch employees onto an existing statutory scheme, which already authorized the EEOC to award "appropriate remedies" in the administrative process, a grant of authority expansive enough to encompass compensatory damages awards. In contrast, Congress included the compensatory damages remedy for congressional employees in an entirely new statute, which for the first time provided a comprehensive administrative and judicial enforcement scheme for their employment discrimination claims.

5. Respondent further contends (Br. 17) that "[a]dministrative proceedings on compensatory damages" would "delay[] federal employees from the exercise of their right to a trial by jury." It is respondent's construction of the relevant statutory provisions, however, that would delay the enforcement of federal employees' rights. According to respondent's position, instead of pursuing a claim for compensatory damages together with a claim for equitable relief in the administrative process,[8] an employee would have to await the completion of the administrative process and only then pursue the claim for compensatory damages in district court. As the briefs amicus curiae of the American Federation of Government Employees and the National Employment Lawyers Association confirm, federal employees, as well as federal agencies, benefit from the EEOC's ability to award compensatory damages as an "appropriate remed[y]" in the administrative process.[9]

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[8] Of course, if the employee was dissatisfied with the compensatory damages awarded at the administrative level, he still could litigate the issue de novo in district court, where he (and the government) would have a right to a jury trial.

[9] Respondent contends (Br. 27) that the adverse impact of his position on federal agencies, federal employees, and the federal courts is trivial, because, "[i]f an agency anticipates liability for compensatory damages, it may correct its error by offering a settlement." But he does not explain how an agency is to anticipate such liability if an employee is under no obligation to inform the agency that he has sustained compensatory damages. He then speculates (Br. 29) that "the pool of potential litigants"—*i.e.*, employees who must go to court to obtain compensatory damages—consequently "does not seem too large." It is impossible to estimate with any precision the number of additional cases that would reach the courts if respondent's position were adopted. But the number could well be substantial. Since 1992, notwithstanding federal agencies' ability to settle

B. The alternative grounds proffered by respondent do not warrant the Court's review on the merits

Respondent urges (Br. 30-39) that the decision below be affirmed on either of two alternative grounds that are not encompassed within the question on which certiorari was granted: first, that he did, in fact, adequately exhaust administrative remedies and, second, that the government should be estopped from asserting his failure to do so, because the government did not advise him of his right to seek compensatory damages in the administrative process. Neither ground warrants the Court's consideration on the merits.

1. Respondent asserts (Br. 30, 33) that "the record affirmatively reveals that [he] exhausted his administrative remedies," because "during the investigation of his case, [he] requested a 'monetary cash award.'" But the court of appeals held that respondent's request for a "monetary cash award" was insufficient to "put the EEOC on notice that he was seeking compensatory damages." Pet. App. 5a; see also *id.* at 23a n.2 (district court concludes that respondent "never asserted facts which would reasonably lead to compensatory damages during the administrative processing of his complaint"). The fact-specific question whether respondent provided the Department of Veterans Affairs or the EEOC with

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employees' claims for compensatory damages voluntarily, the EEOC has issued hundreds of decisions involving compensatory damages claims. In addition, the Eleventh Circuit, adopting the Seventh Circuit's rationale in this case, has held that, while agencies may voluntarily settle an employee's Title VII cases involving compensatory damages, agencies cannot be required by the EEOC to include compensatory damages in any offer of full relief to an employee pursuant to 29 C.F.R. 1614.107(h). See *Crawford* v. *Babbitt*, 148 F.3d 1318 (1998), petition for cert. pending, No. 98-1332.

adequate notice of his claim for compensatory damages is not of "sufficient general importance" to merit the Court's attention. *United States* v. *Nobles*, 422 U.S. 225, 241-242 n.16 (1975).[10]

Respondent also raises (Br. 35) the broader argument that a federal employee adequately exhausts administrative remedies merely by making "factual allegations of unlawful discrimination," without identifying the nature of the remedy that he is seeking for such discrimination.[11] Neither the court of appeals nor the district court addressed that argument. This Court should not do so either. See, *e.g.*, *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996) (declining to address an issue both because it was "outside the scope of the question presented in this

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[10] Respondent claims (Br. 33-35) that the EEOC concluded in *Price* v. *United States Postal Service*, EEOC Appeal No. 01945860, 1996 WL 600763 (Oct. 11, 1996), that similar language was sufficient to state a claim for compensatory damages. But *Price* is distinguishable on its facts. The complainant in *Price* stated in her written request for counseling that she was seeking an "appropriate monetary reward" because her supervisor had allegedly "grabbed her by the arm, and pushed her." *Id.* at *1. She did not claim to have been denied a position or a promotion, and thus would not have been eligible for back pay. In such circumstances, the only "monetary reward" that she could have been seeking was compensatory damages. In contrast, since respondent had complained about the denial of a promotion and had specifically requested "GS-11 backpay" in his EEO complaint (J.A. 23), respondent's oral statement to an EEO investigator that he would accept a "monetary cash award" (Resp. Br. 33) in order to settle the case could appropriately be construed as referring to back pay alone.

[11] Similar arguments are raised by amici American Federation of Government Employees and National Employment Lawyers Association.

Court" and because "we generally do not address arguments that were not the basis for the decision below").

Respondent's position is inconsistent, moreover, with the text and purposes of the exhaustion requirement of Section 2000e-16(c) and with Congress's treatment of exhaustion in other contexts. Section 2000e-16(c) authorizes a federal employee to file suit in district court only "if aggrieved by the final disposition of his *complaint*, or by the failure to take final action on his *complaint*" by his employing agency or by the EEOC (emphasis added). The term "complaint" is ordinarily understood to include a demand "for the relief the pleader seeks." Fed. R. Civ. P. 8(a); *Black's Law Dictionary* 285 (6th ed. 1990). Nor would the purposes of administrative exhaustion be served if the agency, in the first instance, and the EEOC, on appeal, had to guess at what relief would satisfy an aggrieved employee. The EEOC and the Department of Veterans Affairs cannot be expected to have known, for example, that respondent was suffering "mental anguish and emotional distress" (Resp. Br. 3) unless respondent told them. Congress's understanding that exhaustion requires a claimant to put the agency on notice not only of the basis for liability, but also of the relief sought, is reflected in the Federal Tort Claims Act, which bars a claimant from instituting a civil action "for any sum in excess of the amount of the claim presented to the federal agency" except in certain specified circumstances. 28 U.S.C. 2675(b).[12]

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[12] The exceptions are "where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time o[f] presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim." 28 U.S.C. 2675(b). We do not contend that a federal employee would be precluded by the exhaustion requirement of

We do not disagree with respondent's contention (Br. 31) that "specific factual pleading of a particular category of damages is not required for exhaustion." The EEOC has not applied the exhaustion requirement in such a rigid manner. As respondent acknowledges (Br. 33-34 n.8), "[t]he Commission has held that a complainant need not use legal terms of art such as 'compensatory damages,' but may merely use words or phrases to put the agency on notice that the relevant pecuniary or non-pecuniary loss has been incurred" (quoting *Price* v. *United States Postal Serv.*, EEOC Appeal No. 01945860, 1996 WL 600763, at *3 (Oct. 11, 1996)). He also acknowledges (Br. 31) that the EEOC has held that "a request for relief may be amended at any time during the administrative process without restriction." But a complainant must do more to put the agency and the EEOC on notice of his claim for compensatory damages than respondent did in this case. As the Fifth Circuit has explained:

> [T]he employee need not present his claim for compensatory damages in a legal or technical manner. He must, however, inform the employing agency or the EEOC of the *particular facts of the case* that demonstrate that he has suffered an emotional and/or mental injury that requires the payment of compensatory damages to make him whole. Such facts obviously must demonstrate

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Section 2000e-16(c) from raising a compensatory damages claim that was based on evidence that was discovered or facts that arose after the conclusion of administrative proceedings. A district court would seem to have the authority in such circumstances either to remand the matter to the agency or the EEOC for consideration of the claim or to deem the exhaustion requirement to be satisfied.

> more than the mere fact of forbidden discrimination or harassment.

Fitzgerald v. *Secretary, United States Dep't of Veterans Affairs*, 121 F.3d 203, 208 (1997)

2. Respondent finally contends (Br. 37) that the government "should be estopped from asserting exhaustion by its failure to advise [him] of his right to request compensatory damages." That claim is unsuitable for resolution by the Court. Respondent's estoppel claim was not addressed by the court of appeals or, except in a single sentence (Pet. App. 23a n.2), by the district court. And the factual premise of the claim has not been established. Respondent, in an affidavit submitted to the district court, asserted that "[t]he EEO counselor, Mr. Mitchell, did not explain to me that I could receive damages for mental or emotional distress." Aff. ¶ 9, Exh. A to Pl.'s Resp. to Def.'s Rule 12(m) Statement. But the government subsequently "dispute[d] and denie[d]" that assertion. Def.'s Reply to Pl. Michael Gibson's Rule 12(n) Statement ¶ 23, at 4. The district court made no findings of fact on the issue.

In any event, this Court, while consistently rejecting claims of equitable estoppel against the federal government, has stated that only "affirmative misconduct" might give rise to such a claim. *OPM* v. *Richmond*, 496 U.S. 414, 421-422 (1990). A mere failure to provide information, especially when that information is publicly available, does not constitute "affirmative misconduct." See *INS* v. *Hibi*, 414 U.S. 5, 8-9 (1973) (per curiam) (government's failure to advise alien who served in U.S. armed forces of naturalization rights did not give rise to equitable estoppel); cf. *Schweiker* v. *Hansen*, 450 U.S. 785, 788-790 (1981) (per curiam) (government employee's erroneous statements that

applicant was ineligible for Social Security benefits did not constitute "affirmative misconduct" that could estop government from denying retroactive benefits).

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For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

APRIL 1999